No. [redacted]79

In the Supreme Court
OF THE
United States

WALDEMAR GNERICH and JEREMIAH T. REGAN, copartners doing business under the firm name and style of B. & S. DRUG COMPANY,
Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,
Appellee.

BRIEF FOR APPELLANTS.

HARRY G. MCKANNAY,
LOUIS V. CROWLEY,
Solicitors for Appellants.

Table of Cases Cited.

No. 483

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BRIEF FOR APPELLANTS.

I. STATEMENT OF THE CASE.

a. Procedure.

This suit was commenced by appellants filing in the United States District Court for the Southern Division of the Northern District of California a bill in equity praying for an injunction restraining appellee as Prohibition Director from doing and performing certain acts in connection with his official duties as Prohibition Director in and for the

District of California, which acts were alleged by appellants to be clearly beyond and without his power and authority as such Prohibition Director, and which acts constituted an unlawful interference with the constitutional rights of appellants and caused appellants to suffer large and continuous damages in their business as pharmacists.

On the hearing of the motion for a temporary injunction, a motion by the then defendant to dismiss the bill was granted on the ground that the bill failed to state facts sufficient to warrant the interposition of a court of equity. An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, which court declined to pass upon the sufficiency of the bill upon tthe grounds, first, that the Commissioner of Internal Revenue was not made a party to the suit, and second, that the original defendant ceased to be Prohibition Director pending the appeal. A petition for a rehearing by said Circuit Court of Appeals was thereafter in due course filed and denied. Thereupon an appeal was taken to the Supreme Court of the United States.

Pending the appeal to the Circuit Court of Appeals, the original defendant, E. C. Yellowley, resigned his office as Prohibition Director for the State of California, and was succeeded by E. Forrest Mitchell, during the month of July, 1921. Thereafter, and likewise pending the appeal, said E. Forrest Mitchell resigned and was succeeded by the

present appellee, S. F. Rutter. An order of substitution of said E. Forrest Mitchell as defendant was made after the submission of the cause to the Circuit Court of Appeals, and an order substituting S. F. Rutter was made by said court after its decision denying the petition for rehearing. (Trans. pp. 42, 66.)

b. The Facts.

Appellants are citizens of the United States and residents of the Northern District of California; and are co-partners in conducting a general pharmaceutical business at San Francisco. Both of appellants are duly licensed by the State of California as pharmacists and are actively engaged in the practice of their profession and in compounding medicinal preparations on physicians' prescriptions, and in dispensing and selling at retail various medicinal preparations, and have been so licensed and occupied for more than ten years last past. In compounding medicinal preparations appellants and all pharmacists must, necessarily use, and have from time immemorial used, alcohol and other distilled spirits in quantities depending entirely upon the volume of business and the number and kind of prescriptions brought to them for filling by their patrons from duly licensed physicians.

In conformity with the National Prohibition Act, and the regulations published by the Secretary of the Treasury and the Commissioner of Internal Revenue under the authority thereof, appellants

and all other pharmacists using alcohol and other "intoxicating liquors" in their business were required to apply for and receive from the Bureau of Internal Revenue of the Treasury Department a permit to dispense and compound medicinal preparations containing such "intoxicating liquors". Appellants duly filled out, verified and forwarded to the Commissioner of Internal Revenue their application on the form prescribed by the Treasury Department, and recited therein that the probable quantity of alcohol and other "intoxicating liquors", as that term is defined by the National Prohibition Act, necessary to the business needs of appellants or required to be on hand or used by them during any quarterly period would be 283 proof gallons of alcohol, 157 proof gallons of whiskey, and 5 gallons of wine. Appellants likewise forwarded with their application a good and sufficient bond on the form prescribed by the Treasury Department in the penal sum of $2,000.00, in conformity with the said regulations. The bond was duly approved and accepted and in due course a permit was issued to appellants authorizing and permitting them among other things

> "to use and sell intoxicating liquor for other than beverage purposes * * * in compounding medicinal preparations on physician's prescription or otherwise medicated according to the standards set forth in Par. A, Sec. 60, Reg. 60 * * * In selling retail as such to others holding permits which confer authority to purchase and use intoxicating liquor for non-beverage purposes. In dispensing as such on a physi-

> cian's prescription given on form 1403 in quantities not exceeding one pint in ten days to same person, and for non-beverage purposes." (Trans. p. 14, Exhibit B.)

The only restriction or limitation placed upon physicians or pharmacists in practicing their profession in relation to the dispensing of alcohol and other intoxicating liquors by either the National Prohibition Act or Regulations 60 published under the authority thereof is that hereinabove set forth in the permit, viz., the same must not be dispensed in quantities exceeding one pint in ten days to the same person and must not be for beverage purposes. Notwithstanding this fact, the Prohibition Commissioner, an office created by the selfsame regulations, inserted in the permit the further attempted limitation, restriction, or prohibition:

> "This permit is issued for 100 gallons of distilled spirits and 5 gallons of wine per quarterly period." (Trans. p. 15.)

Right here we find the crux of this case. Congress in enacting the National Prohibition Act, and the Secretary of the Treasury and Commissioner of Internal Revenue in publishing "Regulations 60" for its enforcement, did not attempt to limit or prohibit the use of alcohol or other distilled or spirituous liquors by physicians and pharmacists, except in the particulars hereinabove stated; and yet, appellants are confronted with the anomalous situation of an individual occupying an office created by the regulations published for the

purpose of enforcing the act, imposing upon appellants an additional limitation and prohibition based upon his own notion or idea of the amount of alcohol and spirits they should use in their business, disregarding appellants' verified statement of their business necessities.

This is all the more perplexing in view of the closing paragraphs of the permit which is as follows:

> "This permit is granted under the conditions that the provisions of National Prohibition Act and regulations issued thereunder will be strictly observed".

Upon receipt of the permit, appellants made applications from time to time to the local prohibition director for permission to purchase alcohol and other distilled spirits. Said applications when approved by the local director constitute permits to purchase under Secs. 54 and 55 of said Regulations 60. On March 2, 1921, in response to a certain application of appellants for permission to purchase one barrel of grain alcohol, they received from the then Prohibition Director a notice that the application was denied for the reason that appellants had already withdrawn for the current quarter a total of 90 gallons and that a permit to purchase a barrel of alcohol would enable appellants to withdraw and use in excess of 100 gallons for the current quarter. Repeated requests were made of the Prohibition Director by appellants that he disregard said 100 gallons limitation inserted in

their permit as an arbitrary, unreasonable, unlawful and void act, but without avail.

Thereupon appellants filed their bill of complaint in the District Court, as above related, to restrain the Prohibition Director from enforcing such limitation and prohibition. (Trans. pp. 1 to 16.)

c. Questions Presented.

From the foregoing, it appears that there are four main questions involved in this appeal:

1. Did the Prohibition Commissioner have the power to place the restriction of 100 gallons in the permit and prohibit the use by appellants of such distilled spirits beyond that limit, and, if not, can appellants have appellee restrained from enforcing the same.

2. Has Congress the power, under the Eighteenth amendment, to restrict or prohibit the use of spirituous liquors for admittedly non-beverage purposes?

3. Was the Commissioner of Internal Revenue a necessary party to the suit?

4. Did the action abate because the original defendant ceased to be Prohibition Director pending the appeal?

II. SPECIFICATIONS OF ERRORS.

We contend that the Circuit Court of Appeals erred in the following particulars:

FIRST: In refusing to enter a decree reversing the judgment and decree of the District Court dismissing the bill of complaint on the ground that said bill did not constitute a cause in equity under the constitution and laws of the United States.

SECOND: In affirming the decree of the District Court granting the motion of the appellee to dismiss complainants' bill of complaint on the ground that the facts alleged in the bill of complaint are insufficient to state a cause of action in equity.

THIRD: In holding and deciding that said Circuit Court of Appeals had no jurisdiction over the subject matter of said cause to grant the relief prayed for therein for the reason that the Commissioner of Internal Revenue was not a party to the suit.

FOURTH: In holding and deciding that the Commissioner of Internal Revenue is a necessary party in a suit whose purpose is to restrain the enforcement by appellee, as Prohibition Director, of a ruling of the National Prohibition Commissioner which is contrary to, and violative of, the regulations published by said Commissioner of Internal Revenue.

FIFTH: In holding and deciding that said Circuit Court of Appeals was precluded from deciding or considering the merits of the cause by the fact that the appellee ceased to be such Acting Prohibition Director during the pendency of the suit.

SIXTH: In failing to hold and decide that the appellee did not exceed the power conferred upon him by law and did not act without his powers as such Prohibition Director in enforcing against appellants a ruling of the Prohibition Commissioner contained in the permit of appellants to purchase, use and dispense "intoxicating liquors" as said term is defined in the National Prohibition Act, that appellants could not purchase, use and dispense more than 100 gallons of "intoxicating liquors" for medicinal purposes in filling lawfully issued prescriptions and in compounding medicinal preparations, during any quarter.

SEVENTH: In failing to hold and decide that the said purported limitation or ruling of said Prohibition Commissioner on the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which appellants could purchase, use and dispense for strictly medicinal purposes in their business as pharmacists, as set forth in said permit, was not null and void and of no force and effect and beyond the power and without the jurisdiction of "Prohibition Commissioner" at Washington to make and beyond the power and without the jurisdiction of the appellee Prohibition Director to enforce.

EIGHTH: In failing to hold and determine that the "Prohibition Commissioner" had no power to make and appellee no power to enforce any limitation upon appellants' right to use and dispense

alcohol and other "intoxicating liquors" for medicinal purposes other than such limitations thereon as are enumerated in the National Prohibition Act itself or contained in the regulations made and published by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury of the United States.

NINTH: In failing to hold and determine that the "Prohibition Commissioner" has no power to make and appellee no power to enforce any limitation or restriction upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, that can be used and dispensed by appellants for other than beverage purposes other than or different from such limitations or restrictions as are expressed in the Eighteenth Amendment to the Constitution of the United States, in the National Prohibition Act itself, or in the rules and regulations duly published by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury of the United States under the authority of said act.

TENTH: In failing to hold and determine that the appellee as Acting Prohibition Director of the State of California had no authority to enforce a limitation upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which could be purchased, used and dispensed by the appellants for medicinal pur-

poses in their business as pharmacists other than or different from the limitation fixed and determined by the amount of the bond furnished by appellants under the provisions of Paragraph A, Sec. 60 of

> "Regulations 60, relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession and use of intoxicating liquor under article 2 of the National Prohibition Act of October 28, 1919, providing for the enforcement of the Eighteenth Amendment of the Constitution of the United States."

ELEVENTH: In refusing to enjoin appellee from continuously and irreparably injuring appellants' business by enforcing the limitation and restriction placed in the permit of appellants to dispense "intoxicating liquor" for medicinal purposes and from acting without authority of law and in violation of the rights of appellants to purchase, use and dispense in their business as pharmacists such amounts of alcohol and other "intoxicating liquor" as that term is defined in the National Prohibition Act "as is necessary to the business needs" of the appellants, as authorized by subdivision A, Sec. 56 of

> "Regulations 60 relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession and use of intoxicating liquor under Article 2, of the National Prohibition Act of October 28, 1919, providing for the enforcement of the Eighteenth Amendment of the Constitution of the United States."

TWELFTH: In failing to hold and determine that any rule or regulation of the Treasury Department published under the authority of the National Prohibition Act or any rule made by the National Prohibition Commissioner or any provision of said National Prohibition Act which has not the purpose and effect of "regulating" the use of "intoxicating liquors" for medicinal purposes but on the contrary has the purpose and effect of "prohibiting" such use is null and void and contrary to the provisions of the Ninth and Tenth Amendments to the Constitution of the United States. (Trans. pp. 71 to 76.)

III. BRIEF OF THE ARGUMENT.

1. Neither the Prohibition Commissioner, or appellee Prohibition Director, has any power other than those specifically granted either by the Prohibition Act or the regulations creating their respective offices.

National Prohibition Act, Title II, Section 1, Subd. 7;

22 Cyc. 1657;

Thatcher v. U. S., 23 Fed. Cas. No. 13,581;

Campbell v. U. S., 107 U. S. 407;

Regulations 60 Relative to the Manufacture, etc., of Intoxicating Liquor, issued by the U. S. Treasury Dept., Bureau of Internal Revenue, edition of Feb. 1, 1920.

2. An injunction will always be granted to restrain an illegal and excessive use of authority.

22 Cyc. 879;

Noble v. Union River Logging Co., 147 U. S. 165; 13 Sup. Ct. 271; 37 Law Ed. 123;

Frayser v. Russell, 9 Fed. Cas. No. 5067; 3 Hughes 227;

McKenzie v. Fisher, 40 App. (D. C.) 74;

Union Distilling Co. v. Bettman, 181 Fed. 419;

Waite v. Macy, 246 U. S. 606; 38 Sup. Ct. 395; 62 Law Ed. 892;

Hoffman Brewing Co. v. McElligott, 259 Fed. 525;

Kuenster v. Meredith, 264 Fed. 243;

Griesedeick Bros. Brewing Co. v. Moore, 262 Fed. 582;

Bulger v. Benson, 262 Fed. 929;

Lambert v. Yellowley, 291 Fed. 640.

3. The Eighteenth Amendment does not authorize the Congress to limit, restrict, or prohibit the use of spirituous liquors for any purpose other than *beverage* purposes, inasmuch as said amendment is a grant of power and the Congress has no right to enlarge the grant by legislation.

Constitution of U. S., Articles IX and X;

Hodges v. U. S. 203 U. S. 1;

Kansas v. Colorado, 206 U. S. 46, 87, 88;

U. S. v. Lackey, 99 Fed. 952;

Civil Rights Cases, 109 U. S. 3;

Hammer v. Daggenhart, 247 U. S. 251;

U. S. v. Dervitt, 9 Wall. 41;
Lambert v. Yellowley, 291 Fed. 640;
United States v. Freund, 290 Fed. 411.

4. The regulation of the practice of medicine and pharmacy are matters clearly within the domain of the powers reserved to the States, no part of which has been granted to the Federal Government by the Eighteenth Amendment.

Lambert v. Yellowley, 291 Fed. 640;
Slaughter Houses cases, 16 Wall. 36;
United States v. Freund, 290 Fed. 411.

5. The action did not abate by the resignation of the original defendant as Prohibition Director pending the appeal to the Circuit Court of Appeals.

30 Stat. at Large, 822;
Smietanka, Collector, etc. v. Indiana Steel Co., 257 U. S. 1.

6. The Prohibition Commissioner was not a necessary party to the action.

IV. ARGUMENT.

1. Neither the Prohibition Commissioner, nor Appellee Prohibition Director, have any powers other than those specifically granted either by the Prohibition Act or the regulations creating their respective offices.

It is worthy of note that neither the Eighteenth Amendment nor the National Prohibition Act created any new office. By the act its enforcement is placed with the Treasury Department, and the

Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is given power to prescribe and publish "Regulations" for its enforcement. (Subd. 7, Sec. 1, Title II, National Prohibition Act.)

This power the Commissioner has exercised in the published Regulations wherein the offices of "Prohibition Commissioner" and "Prohibition Director" are created. To be lawful, regulations must first be prepared by the Commissioner of Internal Revenue and have the approval of the Secretary of the Treasury, and, second, be published.

> "It is fundamental that the law-making power is exclusively in Congress and cannot be delegated to any other department; but regulations made by an executive department in pursuance of authority delegated by Congress have the force of law, and are of as binding force as if incorporated in the body of the act. * * * The Commissioner is authorized to make regulations to carry out the law; nevertheless the Commissioner cannot alone, or in connection with the Secretary of the Treasury alter or amend the law."
>
> 22 Cyc. 1657;
>
> Thatcher v. U. S., 23 Fed. Cas. No. 13851.

In Campbell v. U. S., 107 U. S. 407, while the facts are not pertinent to the case at bar, yet, commenting upon the power to make regulations, the court said:

> "It will be a curious thing that Congress, after clearly defining the right of the importer to receive drawback upon subsequent importa-

> tions of imported articles on which he had paid duty, had empowered the Secretary by regulations, which might be proper to secure the government against fraud, to defeat totally the right which Congress had granted. If the regulations themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable."

Congress having recognized the right of physicians to prescribe liquor and of pharmacists to fill prescriptions and compound medicinal preparations within the limitations fixed by the National Prohibition Act and the therapeutic value of spirituous liquors being likewise conceded by said act, it would seem that these rights could not be curtailed or their exercise prevented or cut down by the dictum of an officer who is the mere creature of the regulations published for the express purpose of "carrying out the provisions" of the act.

Physicians are granted the right to practice medicine, and pharmacists the right to compound medicinal preparations and dispense the same, under and by state laws. They did not acquire any right so to do under any law of the United States, or under or by virtue of any permit issued to them by the National Prohibition Commissioner or the Commissioner of Internal Revenue. In making the application for a permit under the regulations aforesaid a pharmacist furnishes whatever information is necessary to show the Commissioner that he has been, under the laws of his state, duly licensed to practice pharmacy; that he has a definite location

of business where he dispenses medicinal preparations and compounds prescriptions; that he has never broken the law and that he has used and will necessarily continue to use alcohol and other liquor for medicinal purposes; that he will properly account for every drop of liquor in his possession, and thereafter purchased by him, and satisfy the Commissioner that the same, and every drop thereof, has been used for medicinal purposes only, and not as a beverage. The Commissioner and his assistants under the regulations published are afforded every facility for determining whether or not a pharmacist has been dispensing liquors for medicinal purposes only, or whether he is hiding behind his state license as a pharmacist to dispense liquors for beverage purposes. The permit is granted to him and he is required to fill out numerous reports and to keep accurate records showing and accounting for all liquor purchased by him or in his possession. Permits to purchase limit the amount he can obtain and he can only dispense the same upon legitimate prescriptions issued and directed to him by a licensed physician who likewise holds a permit under the same law and regulations, to issue prescriptions for intoxicating liquors. (See National Prohibition Act, Title II, Sec. 7.) All of such records, permits and prescriptions are upon blank forms furnished by the Treasury Department. The pharmacist furnishes a bond to protect the government against fraud on his part in purchasing, dispensing and accounting for said liquors or in using

said liquors for anything other than medicinal purposes, the form and amount of which bond is likewise fixed by the regulations. (See "Regulation 60", pp. 86 to 110.) In the case at bar the appellants are found to be pharmacists duly qualified under the laws of the State of California, to practice their profession and they accompanied their application for a permit to dispense intoxicating liquors for medicinal purposes with a bond sufficient in amount under the regulations to entitle them to purchase or have on hand for said use during any quarterly period an amount not exceeding five hundred gallons. The Prohibition Commissioner's edict, however, is that appellants can only have on hand or use one hundred gallons per quarter, which action on the part of said Commissioner instead of constituting a regulation, has no basis or authority in the published regulations, is contrary to the express language thereof, and is a plain case of usurpation of legislative power, by the Prohibition Commissioner, and in so far as appellants are concerned results in a denial to them of their constitutional rights.

Appellants were required in their application for a permit under the regulations to state the amount of alcohol and intoxicating liquor they would likely use in their business during any quarterly period. Guided by the business demands for previous quarters, enlightened by their own records of the quantity previously used, they state that 283 proof gallons of alcohol and 157 proof gallons of whiskey

per quarter will be the probable amount required in their business. Under the regulations (Sec. 20a) a bond of two thousand dollars, sufficient to cover this amount, was furnished the government with the application.

The bond and application are approved, a permit is granted, but without authority, rhyme or reason, the Prohibition Commissioner inserts therein: "This permit is issued for 100 gallons of distilled spirits per quarter." He could just as readily have said "*one thousand* gallons per quarter", or perchance "*ten* gallons per quarter", or, if his whim so dictated: "*No* gallons per quarter."

Such attempted exercise of discretion on his part is contrary to the following provisions of "Regulations 60", etc., *supra*, which determine in no uncertain language that the quantity that can be purchased and dispensed is fixed by the bond filed, and "the business needs of the applicant", and not otherwise:

> Section 22. "Whenever the quantity of intoxicating liquor or other preparations debited against the bond is such that the existing penal sum is not sufficient, a new bond must be furnished in sufficient sum to cover all liability."
>
> Section 55a. "The applicant must assure himself that the quantity of intoxicating liquor outstanding as a debit against his bond, together with the additional quantity applied for, is not in the aggregate greater than the quantity covered by the penal sum of the bond."
>
> Section 56a. "*Such applications to purchase may call for amounts of liquor necessary to*

the business needs of the applicant, provided that the aggregate amount secured in any quarterly period does not exceed the amount covered by the penal sum of the applicant's bond."

Section 55d. "Applications for permit to purchase will be made in triplicate, except that when transportation is involved, one or two additional copies should be made for delivery to the carrier or carriers at the point of destination as required by Article XVI. All copies will be forwarded to the director, *who, if he finds the applicant entitled to procure intoxicating liquor, and if the applicant's bond is sufficient, will approve all copies of the application and note upon them the date of expiration.*"

Section 20. "All persons desiring to obtain permits provided by these regulations, except as provided below, must at or before the time of filing application therefor, file with the Director a bond in duplicate on Form 1408 or Form 1409, to insure compliance with the provisions of this Act, and of these regulations, as well as to cover any taxes and penalties which may be imposed under the Internal Revenue laws. * * *

(a) Except where otherwise provided, the basis of the penal sum of such bond will be as follows: $4.20 per proof gallon, or fractional part thereof, on wine, malt liquor, cider or other liquor manufactured or received during any quarterly period of the calendar year plus the quantity on hand at the end of the preceding quarterly period. In no case shall the penal sum of any bond be less than $1000, nor more than $100,000."

Nowhere do said "Regulations 60" purport to contain any grant of authority or discretion to the

Commissioner of Internal Revenue, or to the "Prohibition Commissioner", or the "Prohibition Director", to place any limitations or prohibition upon the amount of liquor that might be dispensed by any licensed pharmacist other than that indicated in the penal sum of his bond, and "the business needs of the applicant."

If appellants have done, or if in the future they do, any act in violation of law, ample authority exists under the law for the revocation of their permit and for their punishment by fine or imprisonment. Being possessed of such a permit, they are entitled as shown above to have their applications to purchase liquor approved, providing their purchases do not exceed the amount permitted by the penal sum of their bond.

As stated by District Judge Bourquin, in dealing with the same regulations in so far as they affect physicians, in the case of U. S. v. Freund, 290 Fed. 411:

> "No doubt Congress was inspired by consciousness of the well known abuse of alcohol in the guise of remedies. In that is justification for reasonable regulations, and the statute contains them, viz., that no physician can prescribe alcohol unless he has secured a permit from the Commissioner of Internal Revenue, and has given bond; that he shall prescribe alcohol only in good faith as necessary medicine, and only upon official forms supplied by the Commissioner, except in emergency; and that he shall keep a record thereof.

In addition, for violations, not only is the physician subject to criminal penalties, but the Commissioner may revoke the permit and thus deprive him of right to further prescribe alcohol. These regulations are appropriate to the prohibition of alcohol as a beverage, are adapted to that end, and are valid. Of them, can be no just complaint. They and their like ought to suffice to restrain therapeutical uses of alcohol within legitimate bounds.

They may fail; nevertheless is no power by virtue of the Eighteenth Amendment to impose regulations and restrictions invalid as aforesaid. If these latter can be fairly claimed to tend to prohibition, if not too remote they are without congressional power for reasons aforesaid.

If a physician cannot be trusted wholly he should not be trusted partially. If he is disposed to abuse prescription of alcohol, he can do so as well with one hundred prescriptions and one-half pint, as with more. At most it is a mere difference in degree, wherein the restrictions invalid as aforesaid might seriously affect physician and patient, and little or none, prohibition."

It seems the height of absurdity that Congress can enact a law, the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, prescribe regulations for its enforcement, wherein alcohol and "intoxicating liquor" are recognized as definite therapeutic agencies and licensed physicians are authorized and permitted to prescribe its use by their patients and pharmacists licensed and permitted to fill such prescriptions, and yet at the same time seriously urge that a local Federal Prohibition Director or a Federal Prohibition Commis-

sioner, who may know nothing about medicine or pharmacy or the lawful and necessary requirements of a pharmacist's business, or of the particular needs of the applicant's business, in the exercise of their official powers, can set aside said law and said regulations, set at naught the medical experience of the ages, as represented in the skill and learning of the physician, and substitute guesswork in lieu thereof. Without desiring to be facetious or sacrilegious, but merely to carry out the absurdity of such contention, it would seem that such claim of authority is only consistent with a power to regulate or prohibit the amount of human ailments that shall exist during any particular quarter of the calendar year in any locality, that require the attendance of a physician.

2. An injunction will always be granted to restrain an illegal and excessive use of authority.

"Where public officers are acting illegally or without authority and in breach of trust and are causing irreparable injury or a multiplicity of actions at law, they will be enjoined."

22 Cyc. 879;

Noble v. Union River Logging R. Co., 147 U. S. 165; 13 Sup. Ct. 271; 37 Law Ed. 123;

Frayser v. Russell, 9 Fed. Cas. No. 5067; 3 Hughes 227;

Lambert v. Yellowley, 291 Fed. 640.

Injunction should be granted, in the absence of an adequate remedy at law to restrain a threatened

violation of plain official duty, requiring no exercise of discretion, or the threatened destruction of a vested right by an act clearly beyond the official's authority.

McKenzie v. Fisher, 40 App. (D. C.) 74.

A distiller is entitled to an injunction to restrain the enforcement by the Internal Revenue Department of any unauthorized order requiring a distilled product known to the trade as "spirits" to be branded as alcohol, which as known to the trade is an inferior and cheaper product.

Union Distilling Co. v. Bettman, 181 Fed. 419 (C. C. Ohio 1908).

A suit in equity may be maintained to enjoin the Board of Tea Appeals under the Act of March 2, 1897, from following illegal tests prescribed in "Regulations" of Secretary of Treasury who designated the board, for there is a presumption that the board will obey the orders of its superior.

Waite v. Macy, 38 Sup. Ct. 395; 246 U. S. 606; 62 Law. Ed. 892.

The action of a deputy collector of revenue in refusing to license or sell revenue stamps to a concern which he claims was violating the War Time Prohibition Act, may be enjoined.

Hoffman Brewing Co. v. McElligott, 259 Fed. 525.

The threatened revocation by the Secretary of Agriculture of a live stock commission agent's license under the Food Control Act, may be enjoined,

as there is no adequate remedy at law and irreparable injury would result from such revocation.

Kuenster v. Meredith, 264 Fed. 243.

> "Courts have jurisdiction to enjoin public officers from enforcing unconstitutional acts, for such officers in enforcing such acts, become mere intermeddlers and are not entitled to protection as officers."
>
> Greisedieck Bros. Brewing Co. v. Moore, 262 Fed. 582.

An injunction lies to restrain the threatened criminal prosecution of a physician under the National Prohibition Act for prescribing in good faith as medicine to be taken internally by his patients within any period of ten days more than one pint of spirituous liquor when such use in the judgment of the physician is necessary to afford relief from some known ailment.

Lambert v. Yellowley, 291 Fed. 640.

In the case of Bulger v. Benson (C. C. A. 9th Cir.), 262 Fed. 529, an order of a local board of steamboat inspectors suspending the license of a pilot was enjoined, where, in making the order, they exceeded their powers.

3. The Eighteenth Amendment does not authorize the Congress to limit, restrict or prohibit the use of spirituous liquors for any purpose other than BEVERAGE purposes, inasmuch as said amendment is a grant of power and the Congress has no right to enlarge the grant by legislation.

The language of the Eighteenth Amendment, pertinent to the case at bar is as follows:

> "Sec. 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for *beverage purposes* is hereby prohibited." (Italics ours.)

The use of the language "for beverage purposes" evidently shows that the states intended to grant out of themselves to the Federal Government the power to prohibit the use of intoxicating liquor for the purposes therein specified and for no other purpose. It is therefore obvious that the people in passing such an amendment reserved to themselves, and retained within the great reservoir of all power except that which has been expressly granted away, the right to legislate through their state legislatures on the subject of the use of liquors for medicinal or sacramental purposes. The only qualification of this statement might be found in the existence of an implied grant to Congress of power to regulate the use of liquor for medicinal and sacramental purposes in so far only as such regulation would be necessary properly to prohibit the use of liquor for beverage purposes.

Inasmuch as the Eighteenth Amendment is a grant of power, Congress had no right to enlarge the grant by legislation.

Congress has no power under the enforcement clause of the Eighteenth Amendment to enlarge the scope of the expressed grant of power therein contained so as to *prohibit* the use of liquors for recog-

nized non-beverage purposes. The incidental power to enforce a grant cannot be used to enlarge and expand the grant itself, especially is this so when to allow it would impinge upon the powers reserved in the states.

Constitution of U. S., Articles IX, X;
Hodges v. U. S., 203 U. S. p. 1;
Kansas v. Colorado, 206 U. S. 46, 87, 88;
U. S. v. Lackey, 99 Fed. p. 963;
Civil Rights Cases, 109 U. S. 3;
Hammer v. Daggenhart, 247 U. S. 251;
U. S. v. Dervitt, 9 Wall. 41.

In the Intoxicating Liquor cases, 253 U. S., page 976, the Supreme Court recognizes that the power of Congress is limited in legislating upon the subject of intoxicating liquors in the following language:

> "While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think these limits are not transcended by the provision of the Volstead Act wherein liquors containing as much as one-half of one per cent of alcohol by volume and fit for use for beverage purposes are treated as within their power."

It seems to follow, therefore, that if there are limits beyond which Congress cannot go in defining what shall constitute intoxicating liquors, for *beverage purposes* certainly we are safe in concluding that Congress would have no power by legislation to *prohibit* the use of spirituous liquors for admittedly *non-beverage purposes.*

Lambert v. Yellowley, 291 Fed. 640.

4. The regulation of the practice of medicine and of pharmacy are matters clearly within the domain of the powers reserved to the states, no part of which have been granted to the Federal Government by the Eighteenth Amendment.

The relations of the state and federal government, one to the other, was clearly outlined and definitely set forth in the opinion of the Supreme Court in the Slaughter House cases (16 Wall. 36). Commenting upon this subject, Justice Clark of the Supreme Court in his dissenting opinion in the Intoxicating Liquor cases, supra, speaks as follows:

> "In the slaughter house and other cases the court was urged to give a construction to the Fourteenth Amendment which would have radically changed the whole constitutional theory of the relations of the state and federal governments, by transferring to the general government that police power through the exercise of which the people of the various states theretofore regulated their local affairs in conformity with the widely differing standards of life, of conduct and of duty which must necessarily prevail in a country of so great extent as ours, with its variety of climate, of industry and of habits of the people. But this court resisting the pressure of the passing hour, maintained the integrity of state control over local affairs to the extent that it had not been deliberately and clearly surrendered to the general government. * * *"

It has never been advanced to my knowledge that the right to legislate upon the subject of the practice of medicine and pharmacy was one within the domain of Congress. If that right still rests within the powers of the state, then it follows without

argument that Congress cannot substitute its judgment in place of that of the physician or pharmacist in the lawful practice of their respective professions, or determine to what extent liquors or alcohol could or should be used in given cases or to what extent human ailments in any particular locality will require the services of a physician or pharmacist. It would seem, therefore, for aught that is contained in the Eighteenth Amendment or necessarily implied therefrom, that the right to practice medicine and pharmacy is as free and unrestricted since the adoption of the Eighteenth Amendment and the Volstead Act as it had been theretofore, and no Act of Congress or no act of the Commissioner under any regulations published by authority thereof can have the purpose or effect of cutting down, preventing or prohibiting the free exercise of those professions. The effort of counsel have been unable to uncover a solitary instance where it has been seriously contended that the power to regulate the practice of medicine and of pharmacy has in any manner been affected in the states by the adoption of the Eighteenth Amendment.

In the exercise of the authority granted to it under the provisions of the Eighteenth Amendment, Congress enacted the so-called Volstead or National Prohibition Act, entitled as follows: "An Act to prohibit intoxicating beverages and to regulate the manufacture, production, use and sale of highproof spirits for other than beverage purposes, and to in-

sure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries." Title II of this act is entitled, "Prohibition of Intoxicating Beverages". At this point it is well to note that the language of the Eighteenth Amendment is that the manufacture, etc. of intoxicating liquors for beverage purposes is prohibited. In other words, the use of intoxicating liquors to be imbibed as a drink is prohibited. The act, however, proceeds to use the word "beverages" as synonymous with "liquors" and proceeds to prohibit their use for *all* purposes except as authorized therein for witness, Sec. 3 of Title II thereof, reads as follows:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, *manufacture, sell, barter, transport, import, export, furnish or possess any intoxicating liquor except as authorized in this act, and all of the* provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. *Liquor for non-beverage purposes* and wine for sacramental purposes *may be manufactured, purchased, sold, bartered, transported, imported, delivered, furnished and possessed, but only as herein provided,* and the commissioner may, upon application, issue permit therefor."

Bearing in mind the language of the Constitutional Amendment and assuming without admitting that the necessity exists for regulating the use of intoxicating liquor for medicinal and sacramental purposes, in order that its use for beverage pur-

poses may not be abused, the very most that can be said against the use of liquors for medicinal and sacramental purposes, is that they are merely *regulated* by the Acts of Congress and the regulations published thereunder and that their uses for said latter purposes is neither restricted nor prohibited. It is obvious that Congress not having the power to prohibit the use of intoxicating liquor for medicinal or sacramental purposes it could not pass any law which in its operation would prevent absolutely the use of intoxicating liquors for such purposes, nor could it authorize the publication of regulations by the Commissioner whereby the same result would be accomplished for it is evident that these powers are still reserved in the states and most certainly the administrative officers of the Treasury Department whose official lives were created by the regulations in question could not rise above the source of their power and accomplish and do the things that Congress itself is powerless to do. On this subject, the Supreme Court has stated in the case of Thatcher v. United States (103 U. S. 679, 26 Lawyer's Edition 535),

> "It is certainly true that the Commission of Internal Revenue cannot alone or in connection with the Secretary of the Treasury alter or amend the Internal Revenue Law. All he can do is to carry into effect that which Congress has enacted. His regulation in aid of the law must be reasonable and made with the view to the assessment and collection of revenue."

In Morrow v. Jones, 106 Fed. 466, the court says:

> "The Secretary of the Treasury cannot by his regulations alter or amend the Revenue Law. All he can do is to regulate the mode of proceedings to carry into effect what Congress has enacted."

In U. S. v. 200 Barrels of Whiskey, 95 U. S. 571, the court says:

> "The regulations of the commissioner do not amend the law. They may aid in carrying it into execution as it exists, but cannot change its positive provision."

I take it as axiomatic, therefore, that no power having been granted to Congress to prohibit the use of liquor for medicinal or sacramental purposes, any Act of Congress or any regulation published under the authority of any Act of Congress, which in effect prohibits the use of liquor for either of these purposes, are violations of the provisions of the Ninth and Tenth Articles of the Constitution of the United States and are absolutely void. From aught that is said in the Eighteenth Amendment, the practice of medicine, of pharmacy and of one's religion remains as it was before the adoption of this amendment. Admitting for the purposes of this brief the power to regulate the uses of alcohol for purposes that are still lawful then there must be some means afforded under the law and the regulations for one to practice medicine and pharmacy and observe the use of wine in connection with his religious practices as freely as ever before.

There should be some avenue open, that by complying with some regulation or by the keeping of records, the furnishing of bonds or other guarantees that will protect the government against fraud, the pharmacist and the medical man can practice their respective professions and use alcohol and other distilled spirits in connection therewith and Rabbis, Priests and Ministers of the Gospel use wines in connection with their religious practices to the extent that they were wont to use them prior to the passage of the National Prohibition Act and the Eighteenth Amendment to the Constitution.

5. The action did not abate by the resignation of the original defendant as prohibition director pending the appeal to the Circuit Court of Appeals.

The authority upon which the Circuit Court of Appeals rested its decision that this action abated upon the resignation of the original defendant from office, namely, Warner Valley Stock Co. v. Smith, 165 U. S. 28, was decided by the Supreme Court of the United States on January 11, 1897, and went no further than to hold that an action against the Secretary of the Interior and the Commissioner of the General Land Office to quiet title to plaintiff's land abated as to the Secretary of the Interior upon his resignation from his office and that such action could not afterwards be maintained against the Commissioner alone. This case ceased to be an authority on February 8th, 1899, when Congress passed an act to prevent the abatement of certain

actions, which act is set forth in 30 Statutes at Large at page 822. It is as follows:

> "No suit, action or other proceeding lawfully commenced by or against the head of any department or bureau or other officer of the United States in his official capacity or in relation to the discharge of his official duties shall abate by reason of his death or the expiration of his term of office or his retirement or resignation or removal from office. But in such event, the court on motion or supplemental petition filed at any time within twelve months thereafter, showing the necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office and the court may make such order as should be equitable for the payments of costs."

This act was interpreted in the case of Smietanka Collector v. The Indiana Steel Co., decided November 15th, 1921, by the United States Supreme Court, wherein it is stated:

> "No different conclusion results from the Act of February 8, 1899, Chapt. 121, 30 Stats. at Large 822, Comp. Stat. Par. 1594; 8 Fed. Stat. Ann., 2nd Ed., p. 593. That is a general provision that a suit by or 'against an officer of the United States in his official capacity' should not abate by reason of his death, or the expiration of his term of office, etc., but that the court, upon motion within twelve months, showing the necessity for the survival of the suit to obtain a settlement of the question involved, may allow the same to be maintained by or against his successor in office."

The authority cited by the appellee and upon which the Circuit Court of Appeals decided that it was precluded from deciding the case on its merits was not filed by appellee until several weeks after the submission of the cause. Appellants having had no opportunity of replying thereto, called upon the United States District Attorney and directed his attention to the enactment of the statute hereinabove referred to and to the decision of the United States Supreme Court hereinabove cited. Thereupon the United States Attorney stipulated in writing, which stipulation is on file among the records on appeal, that the action need not abate but could be maintained against the successor in office of the defendant in error. From the language of the opinion of the Circuit Court of Appeals we fear that this stipulation escaped.

We respectfully submit that inasmuch as the case upon which the opinion and decision of the Circuit Court of Appeals was based ceased to be an authority both by the express statutory enactment of Congress and by a later decision of the Supreme Court of the United States, and inasmuch as the decision of the Circuit Court of Appeals was furthermore based upon the belief that the action of the "Federal Prohibition Commissioner" as complained of in the bill of complaint was the action of the Commissioner of Internal Revenue, the Circuit Court of Appeals was not precluded from deciding the case on the merits.

6. The Prohibition Commissioner was not a necessary party to the action.

The Circuit Court of Appeals considered further that it was precluded from deciding or considering the merits of the case, because the Commissioner of Internal Revenue was not made a party to the suit. To quote from the opinion of the court:

> "It is the *Commissioner of Internal Revenue*, as will be seen by the provisions of the National Prohibition Act that have been referred to, who is authorized to issue a permit for the manufacture, sale, purchase, transportation or prescriptions of any intoxicating liquor, and a bill in the present case expressly alleges that it was the Commissioner who issued the permit upon which the complainants relied, alleging the invalidity of that portion of it restricting the permit to one hundred gallons of distilled spirits and five gallons of wine, and yet the Commissioner was not made a party to the bill, the very purpose of which was to control his action. That under such circumstances the bill could not be maintained even conceding that it states facts sufficient to constitute a cause of action in the complainant's favor is clearly shown by the decision of the Supreme Court in Warner Valley Stock Company v. Smith, 165 U. S. 28, and cases there cited."

It is true that in the bill of complaint it is alleged that the "Commissioner" issued the permit, but it will be noted that the "Commissioner" referred to therein is the "Prohibition Commissioner" and not the "Commissioner of Internal Revenue" as stated in the opinion of the court. The "Prohibition Commissioner" is a creature of the regulations,

published by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, as pleaded in the bill of complaint. It has been and is the contention of the appellants that, being a creature of the regulations, that official had only such powers as are specifically granted to him therein and none other. Being authorized by the regulations to issue permits, in doing so he cannot enlarge upon the powers therein specifically granted to him. Appellants have been unable to find in the law or the regulations, and defendant in error has not pointed out any grant to that officer of any discretion to insert the restrictions in appellants' permit of which we complain. The instrument which breathed the breath of life into his official body, viz., the regulations, is the mode and the measure of his power and unless that instrument authorizes him in his official capacity to determine the amount of liquor that can lawfully be used and dispensed by the appellees then such an attempted limitation and prohibition by that officer was his personal action, without official sanction and as void as if it had been inserted in the permit as a prank or a joke by a total stranger.

The conclusion of the Circuit Court of Appeals that the Commissioner of Internal Revenue is a necessary party, we respectfully represent, could only flow from an *a priori* determination that the appellee in enforcing against appellants the restriction complained of was acting within the authority conferred upon him and the Prohibition

Commissioner by the law and the regulations. Assuming that the lower court's reasoning be correct and assuming that the Commissioner of Internal Revenue was before this court in this or any similar proceeding involving the same facts, under the language of the law and the regulations would he not have a complete answer to appellants' complaint in that the restriction sought to be enforced against appellants by appellee is not the act of the Commissioner of Internal Revenue but the personal act of the National Prohibition Commissioner? We must conclude therefore that, unless the published regulations specifically authorize the National Prohibition Commissioner in his discretion to insert in permits limitations other than those specifically enumerated in the act and the regulations, the Commissioner of Internal Revenue could and would deny responsibility for the act of his subordinate. To state the converse of the proposition, assuming that appellants' bill of complaint otherwise states a cause of action for the interposition of a court of equity, how could it be made to state a cause of action against the Commissioner of Internal Revenue unless it first be shown that said official authorized the action of his subordinate and that it was within the scope of his authority?

The Circuit Court of Appeals expressed in its opinion the view that it is "the very purpose of this action to control the action of the Commissioner of Internal Revenue". This we submit is error, inasmuch as we are unable to attribute to that offi-

cial responsibility for any of the acts of which we complain, and we know of no conduct on his part that in any manner infringes upon our rights, unless it be held that the acts of the National Prohibition Commissioner and the defendant in error are consistent with and authorized by the language and provisions of the regulations published by the Commissioner of Internal Revenue. In Subdivision 7 of Title II of the National Prohibition Act it is provided that "any act authorized to be done by the Commissioner (of Internal Revenue) may be performed by any assistant or agent designated by him for that purpose". But the regulations published by the Commissioner of Internal Revenue creating the office of National Prohibition Commissioner do not purport to grant the latter official the power to do the acts complained of and so far as we can determine from anything in the act or the regulations the Commissioner of Internal Revenue himself does not claim to possess any such power, and so far as appellants are concerned he has never attempted to exercise such power.

Furthermore assuming as we contend that the Congress had no power under the National Prohibition Act to place in said act the restrictions and prohibitions set forth therein against the practice of medicine and pharmacy and that said National Prohibition Act is in those particulars unconstitutional and void, then the enforcement of said restrictions can be enjoined as against any public officer attempting to enforce them.

> "On the other hand laws and means that infringe the aforesaid requirements of valid congressional enactments are such in name only, are ineffective, unenforcible, and of the concern, power and duty of the courts to so determine, adjudge and declare whenever brought within their jurisdiction."
>
> U. S. v. Freund, supra.

The bill of complaint shows that appellants are acting not only in their individual capacity, but also at the behest of the Retail Druggists' Association of San Francisco and the Alameda County Pharmaceutical Association. These associations of business men hope for and expect some word from this court that will serve as a guide to them in determining the limits of their rights as citizens and pharmacists to pursue their legitimate professions within the law. Assuming, as we respectfully believe the law to be, that the appellee is acting in an unofficial, arbitrary, unlawful and unwarranted manner and is preventing literally hundreds of firms within this jurisdiction, of their constitutional right to practice a lawful, humanitarian and needful profession except to the extent that he vouchsafes they should practice it, we respectfully submit that the balance of inconvenience lies rather with the appellants than with the official whose personal views may suffer violence by a decision on the merits. Desiring to know and obey the law, appellants urgently and respectfully ask that the issues of law hereinabove referred to be interpreted for

them to the end that their losses and inconvenience be reduced to a minimum at the earliest moment consistent with the orderly procedure of our courts.

CONCLUSION.

Wherefore, it is respectfully submitted that the Bill of Complaint properly states a proper case for the issuance of an injunction and it should be so ordered and the cause remanded for that purpose.

Dated, San Francisco,
February 9, 1924.

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